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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 695 41

NORTHERN COAL & DOCK COMPANY, a Corporation, and GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., OF PERTH, SCOTLAND,

Petitioners,

v.

EMMA STRAND and INDUSTRIAL COMMISSION OF WISCONSIN,

Respondents.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Brief for Respondent, Industrial Commission of Wisconsin

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Industrial Commission of Wisconsin.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 685

NORTHERN COAL & DOCK COMPANY, a Corporation, and GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., OF PERTH, SCOTLAND,

Petitioners,

v.

EMMA STRAND and INDUSTRIAL COMMISSION OF WISCONSIN,

Respondents.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Brief for Respondent, Industrial Commission of Wisconsin

This case comes to this court on a writ of certiorari to the supreme court of the State of Wisconsin. The judgment and the opinion of the supreme court of Wisconsin (*Northern Coal & Dock Company v. Industrial Commission,* 193 Wis. 515, 213 N. W. 658, 215 N. W. 448) are printed on pages 56-62 of the transcript of record.

STATEMENT OF FACTS

The Northern Coal & Dock Company is in the business of mining, hauling and selling coal at retail. It has no boats (Rec. 32). At Superior the coal is unloaded from boats, stored, and reloaded into cars for shipment to coal dealers (Rec. 32). Eighteen men are employed (Rec. 37), variously designated as scraper men, hoisters, bridge operators, gripmen, laborers, firemen, engineers, electricians, blacksmiths, carpenters and carloaders (Rec. 45).

Boats are unloaded during seven months a year (Rec. 40) at an average of five boats a month (Rec. 41). In the 1924 season approximately thirty-one boats were unloaded (Rec. 35, 41). It takes about 15½ hours to unload a boat (Rec. 41). All of the employes help unload regardless of their usual occupations (Rec. 45), and about one-half of them are required to get into the boat (Rec. 45). If the employes did nothing but unload boats, they would be employed an average of five days a month for seven months in a year. There are no employes who do nothing but unload (Rec. 40).

Charles Strand was designated as a carloader man (Rec. 38, 44), but he was sort of a general utility man (Rec. 34), working as an oiler when a boat was in (Rec. 33) and at other times working as elevator man and scraper man. On the day preceding the accident he was employed as a carloader. On October 22, 1924, the general foreman ordered him to go into the boat to help clean up the coal left outside of the reach of the clam shell (Rec. 37). While working in the hold, he was squeezed in between the clam shell and the side of the boat (Rec. 37) and killed instantaneously (Rec. 39).

Strand worked on the average of nine hours a day (Rec. 35). In 1924 he worked 117½ hours on 31 boats (Rec. 34). Although performing other duties in connection

with these 31 boats, he did not work even five days in the hold (Rec. 38). His time when not unloading was divided between his work as carloader, elevator man and scraper man (Rec. 34).

Emma Strand, the widow of Charles Strand, filed an application with the industrial commission of Wisconsin asking for death benefits from the employer and its insurance carrier (Rec. 13-14). After a hearing, findings were made that Charles Strand and his employer were subject to the provisions of the Wisconsin compensation act and an award was made to Emma Strand in the sum of $4,653.56 and $200.00 burial expenses (Rec. 18-20). An action to review the award was commenced by the employer and insurance carrier (Rec. 1-7); and the award was sustained by the circuit court of Dane county (R. 48-51). The employer and insurance carrier appealed from the judgment to the supreme court of the State of Wisconsin, which court affirmed the judgment (Rec. 54-55) and later denied a motion for rehearing (Rec. 58-59).

SUMMARY OF ARGUMENT

Charles Strand, the deceased workman, was neither a seaman nor a stevedore; and his employer, the Northern Coal & Dock Company, was a coal dealer not engaged in navigation. Therefore, the application of the state compensation act in the case here presented will not work material prejudice to the characteristic features of the general maritime law.

Millers' Indemnity Underwriters v. Braud, 270 U. S. 59, 46 Sup. Ct. 194, 70 L. Ed. 470;
Grant Smith-Porter Ship Company v. Rohde, 257 U. S. 469, 42 Sup. Ct. 157, 66 L. Ed. 321.
State Ind. Board of the State of N. Y. v. Terry & Tench Co., 273 U. S. 639, 71 L. Ed. 817.

In no event, however, were the parties subject to the maritime law because (1), they had contracted with reference to the state compensation law; and (2), the work was not being performed under a maritime contract.

Grant Smith-Porter Ship Company v. Rohde, 257 U. S. 469, 476, 42 Sup. Ct. 157, 66 L. Ed. 321;
Anderson v. Miller Scrap Iron Co., 169 Wis. 106, 113-114, 170 N. W. 275, 171 N. W. 935;
Southern Pacific Co. v. Jensen, 244 U. S. 205, 61 L. Ed. 1086, 14 N. C. C. A. 597, 37 Sup. Ct. Rep. 524;
State Ind. Com. of N. Y. v. Nordenholt Corp. et al, 259 U. S. 263, 66 L. Ed. 933, 42 Sup. Ct. Rep. 473, 21 N. C. C. A. 862;
Chelentis v. Luckenbach Steamship Company, 247 U. S. 372, 382, 62 L. Ed. 1171, 38 Sup. Ct. Rep. 501;
Smith & Son v. Taylor, — U. S. —, 72 L. Ed. 273, (Advance Opinions);
Rosengrant v. Havard, 273 U. S. 664, 71 L. Ed. 829.

Where the state statute makes the workmen's compensation act the exclusive remedy where both the employer and employe are under the act, the industrial commission has jurisdiction to entertain an application for compensation for death occurring on navigable waters.

The Harrisburg, 119 U. S. 199, 30 L. Ed. 358, 7 Sup. Ct. Rep. 140;
Panama Railroad Company v. Rock, 266 U. S. 209, 69 L. Ed. 250, 45 Sup. Ct. Rep. 58;
American Steamboat Co. v. Chase, 16 Wall. 522, 21 L. Ed. 369;
Bloom v. Furness-Withy & Co., 293 Fed. 98.

ARGUMENT

I. *The Application of the State Compensation Act Will Work no Material Prejudice to the Characteristic Features of the General Maritime Law.*

In *Millers' Indemnity Underwriters v. Braud*, 270 U. S. 59, 64, 46 Sup. Ct. 194, 70 L. Ed. 470, a diver was killed while submerged from a floating barge anchored in navigable waters for the purpose of removing timbers which had become an obstruction to navigation. In upholding an award of compensation, this court said:

> "In the cause now under consideration the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the state Compensation Act; but the matter is of mere local concern and its regulation by the State will work no material prejudice to any characteristic feature of the general maritime law. The Act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist."

In *Grant Smith-Porter Ship Company v. Rohde*, 257 U. S. 469, 476, 42 Sup. Ct. 157, 66 L. Ed. 321, in which a state compensation law was applied to an injury received by a workman on a partially completed vessel lying in dock in navigable waters, this court said:

> "* * * Under such circumstances regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations. *Southern Pacific Co. v. Jensen*, 244 U. S. 205; *Western Fuel Co. v. Garcia, ante*, 233."

See also: *State Ind. Board of the State of N. Y. v. Terry & Tench Co.*, 273 U. S. 639, 71 L. Ed. 817, following above cases.

These cases, it is respectfully submitted, control the present controversy. The boat on which Strand was killed did not belong to his employer. The Northern Coal & Dock Company did not own or operate any steamboats, nor did it engage in the business of stevedoring (Rec. 32). It was simply a coal dealer (Rec. 31) receiving shipments by water instead of rail (Rec. 32). Strand was not a seaman or a stevedore; he was simply an elevator worker (Rec. 34, 38, 44) who spent approximately two per cent of his working-time on navigable waters (Rec. 38). We have the situation, then, of a non-maritime worker killed while working for a non-maritime employer. The compensation is payable, not by a steamboat or stevedoring company, but by a coal dealer. It is difficult to see how permitting the state compensation law to apply can work any material prejudice to any characteristic features of the general maritime law or interfere with its proper harmony in its international or interstate relations.

II. *The Parties Contracted with Reference to the Wisconsin Compensation Act.*

It is unnecessary to rely on the rule that the local compensation law may be applied where it will work no material prejudice to the characteristic features of the general maritime law, for (1) the parties contracted in reference to the Wisconsin compensation act and (2) they were not working under a maritime contract—each a condition that precludes the application of the admiralty law.

In *Grant Smith-Porter Ship Company v. Rohde*, 257 U. S. 469, 476, 42 Sup. Ct. 157, 66 L. Ed. 321, this court said:

"* * * The injury was suffered within a State whose positive enactment prescribed an exclusive remedy therefor. And as both parties had accepted and proceeded under the statute by making payments to the Industrial Accident Fund it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law. *Union Fish Co. v. Erickson,* 248 U. S. 308."

In the present case, in one year Strand worked 117½ hours unloading boats (Rec. 34). Strand worked on the average nine hours a day (Rec. 35); therefore he worked 2700 hours a year. In 1924 he spent 117½ hours unloading boats (Rec. 34)—less than 5 per cent of his time. In the same year he did not spend even five days working in the hold of a boat (Rec. 38)—less than 2 per cent of his time. The rest of his time was spent in work on the docks (Rec. 33, 34).

Isn't it a fair inference that in the contract of employment between Strand and his employer, the ninety-five per cent of his work was considered and not the five per cent? The likelihood is that neither employer nor employe gave a thought to the few hours that would be spent on navigable waters. It was an agreement for work on land, and therefore, the state compensation law enters into and becomes a part of that contract.

Anderson v. Miller Scrap Iron Co., 169 Wis. 106, 113-114, 170 N. W. 275, 171 N. W. 935.

III. *Strand was not Working under Maritime Contract.*

In *Southern Pacific Co. v. Jensen,* 244 U. S. 205, 217, 61 L. Ed. 1086, 14 N. C. C. A. 597, 37 Sup. Ct. Rep. 524, this court said:

"The work of a stevedore in which the deceased was engaging is maritime in its nature; *his employment was a maritime contract;* the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. *Atlantic Transport Co. v. Imbrovek,* 234 U. S. 52, 59, 60." (Italics ours.)

In *State Ind. Com. of N. Y. v. Nordenholt Corp. et al,* 259 U. S. 263, 273, 66 L. Ed. 933, 42 Sup. Ct. Rep. 473, 21 N. C. C. A. 862, 866, this court said:

"* * * The liability of the employer for damages on account of injuries received on shipboard by an employee *under a maritime contract* is matter within the admiralty jurisdiction; but not so when the accident occurs on land." (Italics ours.)

In *Grant Smith-Porter Ship Company v. Rohde,* 257 U. S. 469, 475, 66 L. Ed. 321, 42 Sup. Ct. Rep. 157, 25 A. L. R. 1008, this court said:

"*The contract for constructing the Ahala was non-maritime,* and although the incompleted structure upon which the accident occurred was lying in navigable waters, neither Rohde's general employment nor his activities at the time, had any direct relation to navigation or commerce. *Thames Towboat Co. v. The Schooner 'Francis McDonald,'* 254 U. S. 242." (Italics ours.)

In *Chelentis v. Luckenbach Steamship Company,* 247 U. S. 372, 382, 62 L. Ed. 1171, 38 Sup. Ct. Rep. 501, this court said:

"The work about which petitioner was engaged is maritime in its nature; *his employment was a maritime contract;* the injuries received were likewise mari-

time and the parties' rights and liabilities were matters clearly within the admiralty jurisdiction." (Italics ours.)

In *Smith & Son v. Taylor*, — U. S. —, 72 L. Ed. 273, (Advance Opinions) this court said:

"Deceased was engaged in maritime work *under a maritime contract.* If the cause of action arose upon the river, the rights of the parties are controlled by maritime law, the case is within the admiralty and maritime jurisdiction, and the application of the Louisiana Compensation Law violates sec. 2 of art. 3. But, if the cause of action arose upon the land, the state law is applicable." (Italics ours.)

See also: *Rosengrant v. Havard*, 273 U. S. 664, 71 L. Ed. 829.

From these expressions it seems clear that one of the determining factors in precluding the application of the local compensation act is the maritime nature of the contract under which the work is being performed. In the present case the employment was not maritime in nature. Less than five per cent of Strand's time was spent in unloading boats (Rec. 34) and less than two per cent of his time was spent in the hold of a boat (Rec. 38). Two per cent seems entirely insufficient to transmute a non-maritime into a maritime contract. It is respectfully submitted that the contract of employment remained non-maritime, and that therefore, giving effect to frequent expressions of this court, the local compensation law must apply to a death occurring in the performance of the contract.

IV. *Where State Statute Makes Workmen's Compensation Act Exclusive Remedy where both Employer and Employe are under the Act, the Industrial Commission has Jurisdiction to Entertain an Application for Compensation for Death Occurring on Navigable Waters.*

It is undisputed that Strand was instantly killed. In the absence of any act of congress or state statute, no suit to recover damages could have been sustained. *The Harrisburg,* 119 U. S. 199, 30 L. Ed. 358, 7 Sup. Ct. Rep. 140; *Panama Railroad Company v. Rock,* 266 U. S. 209, 211, 69 L. Ed. 250, 45 Sup. Ct. Rep. 58. When state statutes give a remedy for death by wrongful act, and the act is done in navigable waters, liability thus created may be enforced in a state court, as well as in the federal court. *American Steamboat Co. v. Chase,* 16 Wall. 522, 21 L. Ed. 369.

The Jones Act (Act of June 5, 1920), c. 250, sec. 33, 41 Stats. 988, 1007 (Comp. St. sec. 8337a), Title 46, ch. 18, sec. 688 U. S. C. A., provides in part:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

In *International Stevedoring Co. v. Haverty*, 272 U. S. 50, 71 L. Ed. 157, 47 Sup. Ct. Rep. 19, a stevedore was held to be a seaman within the scope of this statute. However, as has been indicated elsewhere, Strand was not a seaman or a stevedore. Recovery for his death must still depend upon the state death statute or a substitute therefor.

Sec. 331.03, Wisconsin Stats., provides:

> "Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state."

Sec. 102.03 of the Wisconsin compensation act provides in part:

> "And where such conditions of compensation exist for any personal injury or death, the right to the recovery of such compensation pursuant to the provisions of sections 102.03 to 102.34, inclusive, and acts amendatory thereof, shall be the exclusive remedy against the employer for such injury or death; in all other cases, the liability of the employer shall be the same as if this and the succeeding sections of sections 102.03 to 102.34, inclusive, had not been passed, but shall be subject to the provisions of sections 102.01 and 102.02."

Except for the compensation act, recovery could be had under the Wisconsin death statute. However, the compensation act substituted for the death statute, in cases

of master and servant under the act, an exclusive remedy—and this remedy can be enforced only before the industrial commission of Wisconsin. Allowing the application of the compensation act in death cases is simply permitting the utilization of a specialized section of the death statute. To deny the jurisdiction of the industrial commission to enter an award is to make a workmen's compensation act destroy the very remedy it seeks to give.

Directly in point is *Bloom v. Furness-Withy & Co.*, 293 Fed. 98, 102, which involved a claim for damages because of the death of one Bloom from injuries suffered on the deck of a vessel. The court said:

> "Under the law of California the plaintiff here, under the facts alleged, could not go into a court of law and assert a claim for damages under the provisions of section 377 of the California Code of Civil Procedure. That section does not apply to her case at all. Any claim that she has must be dealt with by a board of commissioners, and she must receive allowances of money in the manner and at the times and for the period which the law and the commissioners acting under it may determine that she is entitled to. Such rights as are given under the California Employers' Liability Act cannot suitably be enforced in the District Court of the United States under admiralty proceedings. From this it must necessarily be concluded that the plaintiff's demurrer to the separate and affirmative defense should be overruled, and an order will be entered accordingly."

CONCLUSION

It is urged that Strand and his employer were not subject to the maritime law, because they were not engaged under a maritime contract; and that even if they had been engaged in a maritime contract, they had contracted with

reference to the state compensation law, and that law should therefore be applied. It is also urged that the only remedy available was the local compensation act, and that this remedy should therefore be allowed. And finally, it is urged that the application of the state compensation act to a case involving a coal dealer who is not engaged in navigation and an employe who spends two per cent of his working time on navigable water will work no material prejudice to the characteristic features of the general maritime law, and that therefore, under the rules pronounced in *Millers' Indemnity Underwriters v. Braud*, 270 U. S. 59, 46 Sup. Ct. 194, 70 L. Ed. 470 and *Grant Smith-Porter Ship Company v. Rohde*, 257 U. S. 469, 42 Sup. Ct. 157, 66 L. Ed. 321, the local compensation law should be applied.

It is respectfully submitted, therefore, that the judgment should be affirmed.

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